

# **MONTANA PUBLIC DEFENDER COMMISSION**

## **CONFERENCE CALL**

### **Minutes**

**March 26, 2009**

*(Approved at the July 23, 2009 Commission Meeting)*

#### **Call to Order**

The Montana Public Defender Commission meeting was called to order by Chair Tara Veazey at 3:00 p.m.

#### **Commissioners Present**

Vic Miller, Harlem; Majel Russell, Billings; Mike Sherwood, Missoula; Tara Veazey, Helena; Stephen Nardi, Kalispell; Jennifer Hensley, Butte; William Snell, Billings; Jim Taylor, Missoula; Kenneth Olson, Great Falls; and Richard (Fritz) Gillespie, Helena

#### **Commissioners Absent**

Caroline Fleming, Miles City

#### **Interested Persons**

Scott Crichton, American Civil Liberties Union of Montana (ACLU); Brent Doig, Office of Budget and Program Planning

#### **Approval of Minutes from the January 9, 2009 Meeting**

The January 9, 2009 minutes will be amended to reflect the Commission's concern about the impact on the public defender system of increased caseloads as a result of the poor economy. The Commission also suggested that a general brochure, including statistics and agency contact information, be developed as an informational tool for legislators and the public. Commissioner Hensley moved to adopt the minutes as amended. Commissioner Nardi seconded the motion. The motion carried. The minutes from the January 9 Committee meetings were not approved.

#### **Committee Assignments for Next Meeting (exhibit 1)**

Commissioner Russell will serve on the Collective Bargaining committee, Commissioner Olson joins the Standards committee, and Commissioner Gillespie will serve on both the Legislative and Standards committees.

#### **Legislative Update (Senate Bills 45 and 263, and House Bills 2 and 3)**

Chair Veazey said that one of the reasons she called this meeting is because so much is happening in the legislature so quickly. Chief Hood gave an update on legislation of interest to OPD (exhibit 2). The bill to provide discovery free of cost sponsored by Senator McGee (SB 45) has been tabled in the House Judiciary committee. Senator McGee and Chief Hood agreed that although the bill failed this year, we now have enough testimony on record to assure that every entity in the state (counties and cities, etc.) understands that the original intent of the bill that established our agency was that discovery was to be at no cost.

The state's budget bill, HB 2, is now in Senate Finance, and a hearing is scheduled for tomorrow

morning. So far the budget is the same as requested by the Governor's office. However, revenue estimates continue to decline, so it is unclear what will happen when executive action is taken. There might be across-the-board reductions. Chair Veazey reviewed the budget process from the Commission's recommendation through the Governor's budget submission and final adoption by the legislature (exhibit 4). Administrative Director Harry Freebourn explained exhibit 3, which anticipates a net effect of a decrease to the OPD budget based on the current version of HB 2.

Chief Hood reported that HB 13 has been signed by the Governor. It provides for an increase in the state's contribution for insurance costs and a one time payment of \$450 for employees making less than \$45,000 per year.

The Supplemental bill, HB 3, contains a request for supplemental funding for the Appellate program. The anticipated shortfall is due to extraordinary transcript costs for six homicides, as well as a spike in post-conviction relief cases.

Criminal bills of interest that have been tabled include a bill to decriminalize marijuana. The bill to increase the number of district court judges is surviving so far with new judges to be added in Helena, Kalispell and Billings. The hearing on the death penalty bill was yesterday, and executive action is expected Monday.

The Commission discussed their role during the legislative process. Some commissioners expressed frustration at the constraints placed on their activities because of their position as an executive branch agency. Although the Commission cannot lobby for funding or for/against any legislation during the session, Commissioners are concerned that the financial situation will undermine the new system to the extent that services will not be much better than under the previous system. Chair Veazey recommended discussing the role of the Commission at the July meeting, how to involve other groups in effective lobbying for the benefit of the system, and what approach the Commission will take if the Standards can't be met due to fiscal restraints.

Chief Hood said that Senator Shockley's bill to revise public defender laws has been amended several times. The current version of the bill requires that OPD provide time and certain other costs to courts so that fees can be assessed. The bill still has language that allows a judge to question the agency's determination of indigence.

### **Current Year Financial Report – Supplemental Request for Program 2**

Mr. Freebourn reviewed exhibit 5, which shows both low and high estimated FY 09 run rates in Program 1. Contract services are currently running higher than anticipated, and the run rates show a projected deficit of \$200,000 to \$300,000, which is similar to the run rates at the same time last fiscal year. Chief Hood and Mr. Freebourn are confident that the projected deficit can be mitigated by controlling travel and supply purchases and they will not file a supplemental request for Program 1. Commissioner Nardi noted that contract costs are especially high in Billings. Chief Hood said that in part it is because the Billings office is never fully staffed. In addition, there are tremendous contract costs in Hardin, roughly \$17,000 per month. Contract Manager Larry Murphy is leading a project to determine the cost of FTE versus contract attorneys for certain case types, and will be looking at soft caps for contract costs.

In Program 2, the FY 09 appropriation appears to be a strategic plan problem; the anticipated expense isn't too different than the FY 07-08 numbers. Mr. Freebourn thinks that the current

expenditure level is appropriate going forward. Chief Hood said that the Appellate office took in 19 new cases in January, including six DN cases with accelerated briefing schedules, which is the most ever. Supplemental funding has been requested for Program 2. Commissioner Taylor asked staff to identify at what point it would make sense to have full time FTE conflict attorneys instead of contracting the conflict cases out, i.e. a separate office to handle post-conviction relief cases. Commissioners Nardi and Veazey thought that since those attorneys would still be under Chief Hood's authority there would be a conflict of interest. Chief Hood said that staff can prepare the financial information, but that won't resolve the conflict of interest issue.

### **Commission General Discussion**

#### **Letter from Dan Donovan (exhibit 8)**

Mr. Donovan identified a problem in Cascade County related to lack of representation prior to the initial court appearance. Chief Hood said that in most areas around the state, courts appreciate early contact with clients. In Great Falls, cases begin differently than other jurisdictions, because felonies go immediately to district court without an appearance in justice court. Judge Sandefur issued an order endorsing early representation, and so far it is going well in all Cascade County courts after a one-week trial period. The situation in Great Falls will continue to be monitored closely.

However, in Kalispell, judges have challenged OPD's authority to provide early intervention. It is also a problem in rural communities unless there is a local public defender office. Chief Hood said that even in those areas the agency is in compliance with the statute, if not the standards. Ultimately, a change in the statute is needed to ensure representation prior to the initial court appearance and to bring the statute into line with the standard. Commissioner Taylor asked for a report on the scope of the problem related to noncompliance with the standard. Commissioner Veazey said that the Commission will reply to Mr. Donovan's letter and thank him for his continued involvement with the public defender system.

#### **American University**

American University (AU) is conducting a pro bono evaluation of the Montana public defender system. They are meeting with commissioners and staff statewide as part of their assessment. Chair Veazey expects the final report by late April, and it will provide a basis for discussion at the July meeting. She expects quite a few suggestions for system improvements. The AU team has two areas of particular interest:

1. Data collection and statistics. This will be discussed at length in July, especially as related to the Legislative Fiscal Division's (LFD) concerns about OPD data.
2. General morale of staff attorneys. They will be looking at whether line staff attorneys are getting productive and ongoing management on a day to day basis versus putting out fires.

Chair Veazey says this is a great opportunity for the agency to identify areas for improvement, and for the Commission to identify the kinds of information they need from staff. The AU committee is incredibly diverse and experienced, including chief public defenders, a judge, and a professor. Commissioner Miller said that he is impressed with the level of engagement and the kinds of questions the AU team asked. Commissioner Nardi stated that the team knows more about public defense in Montana than anyone else – they are being very thorough, and have read everything there is to know about the system from statute to standards to reports.

Chief Hood said that following discussions with the LFD, detailed case by attorney reports were provided (exhibit 7C) and they are now satisfied. In general new case reporting is working very well, but uniformity in closing cases is still in progress.

### **MTACDL Dues**

Commissioner Sherwood would like to discuss increasing the membership dues that the agency pays to the Montana Association of Criminal Defense Lawyers (MTACDL) on behalf of public defenders. He said the approximately \$7,000 per year OPD currently pays is far from putting MTACDL on par with the county attorney's association. In addition, MTACDL doesn't get seminar fees from OPD staff because the agency is presenting excellent training, further impacting MTACDL's financial position. He will bring information to the July meeting.

### **Discuss Agenda for July Meeting in Polson and/or Another Conference Call**

The July meeting is scheduled for July 23-25 in Polson. Chair Veazey proposed the following agenda items:

- Presentation by one or members of the American University team
- Strategic planning — reflect on work done so far and how to go forward
- Committee meetings
- Orientation for new commissioners (and “reorientation” for other members) — background on legislation, system development, etc.

Chair Veazey expressed concerns regarding travel time to the meeting for the eastern Montana members, as well as the costs to meet in Polson. Balancing fiscal responsibility with the important work of the Commission is a challenge.

### **Public Comment**

Mr. Crichton has concerns about the agency's workload and budget and has been pointing out to legislators that there is no point in creating a system and then underfunding it. He said that the criminal defense lobby should not be up to the ACLU and hopes that MTADCL can fund a lobbyist in the next session. Commissioner Nardi asked Mr. Crichton to participate in the July discussion regarding the formation of the system.

Appellate Defender Koan Mercer is looking forward to the July meeting and plans to attend. He would like to see development of a strategic plan for the next legislative session beginning now. He thinks that the OPD should be independent of the chief law enforcement officer in the state (the Governor) and said being part of the Executive branch is hard on staff morale. Mr. Mercer also encouraged the Commission to consider having public comment earlier in meetings while discussions are ongoing.

### **Old Business/New Business**

There was no old business to discuss.

Chair Veazey made some background comments regarding new business. The Commission can discuss general issues regarding office policy, including personnel policy. However, to discuss individual personnel issues, the Commission must hold a closed executive session, which entails giving public notice of the meeting and inviting any personnel involved.

Commissioner Hensley wanted to discuss a story printed in the *Montana Standard* stating that a public defender employed by OPD had been prohibited from private practice for 10 years, but is being allowed to continue as a public defender. Chief Hood said that the story is accurate and was first in the newspaper a year ago. She clarified that the employee is on probation and is prohibited from having his own practice. Commissioner Hensley asked that another meeting be scheduled to discuss the issue in closed session.

### **Adjourn**

Commissioner Nardi moved to adjourn. Commissioner Hensley seconded the motion. The motion carried and the meeting adjourned at 5:20 p.m.